NO. 653

IN THE

Supreme Court of the United States

OCTOBER, 1945, TERM

GAS RIDGE, INC.
Petitioner

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.
Respondent

SECOND PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Comes now Gas Ridge Inc. with leave of this Honorable Court being first obtained and files this, its second petition for a rehearing, and petitions this

Court to vacate and set aside its decision denying Gas Ridge, Inc.'s petition for certiorari upon the following new grounds:

The Decisions of the District and Circuit Court of Appeals Are Founded upon a False Issue Due to Respondent's Attorney Misquoting Term Clause in Lease when Requested by District Court Judge to Write the Court's Findings.

The cancellation of the oil and gas lease is the sole subject of this litigation involving its term clause alone which provides "for the term of five years from this date and as long thereafter as *oil* OR *gas* is produced from said lease premises etc." Plt. Ex. 1, Ex. Appendix pp. 1 and 2. Copy is to be found on pp. 43 to 47 in petition for certiorari.

The Findings of Fact and Conclusions of Law quote the same term clause but change the connective OR to AND. The Circuit Court of Appeals approved the Findings of Fact and Conclusions of Law, even though its attention was called to the misquoting both by appellant in its briefs and by Judge Sibley in his dissenting opinion.

It makes a decided difference under the existing facts and conditions surrounding this lease, as will be shown later, whether both oil and gas or only either oil or gas must be produced in order that the lease may be extended beyond the primary term of five years when it is admitted by the plaintiff in its pleadings that there has been and still is con-

tinuous production of natural gas. (Tr. R. p. 19) Therefore, that admission decides this case because the plain language of the term clause uses the connective OR instead of AND between the words "oil" and "gas." Petitioner is therefore entitled to a decision based upon the language of the lease term clause and not upon a misquoted term clause, in order to meet the requirements of the due process of law.

The following are the instances in which the misquoting appears in the records.

In plaintiff's two complaints in the District Court,

that is, the first (Tr. R. 5) and second amended (Tr. R. 19) complaints.

The lease was offered in evidence, Tr. R. 34, by the plaintiff's counsel, Knox Miller, and is Plaintiff's Exhibit I in Exhibit Appendix, pages 1 and 2. The term clause in it contains the word OR and not AND. There is therefore no dispute that the term clause in the original lease contains the connective OR and not AND.

On September 26, 1944, the Honorable W. A. Keeling, judge of the District Court, now deceased, rendered a memoranda opinion stating that upon the merits of the case the Court rendered judgment in favor of the complainant and further stated that in the event defendant intended to appeal, then the Court requested complainant to prepare Statement

of Facts and Conclusions of Law. Tr. R. 176. Defendant objected to this and called the Court's attention to District Court Rule No. 52 which requires the Court in court trials to write its Findings of Fact and Conclusions of Law. However, the judge did not change his order.

Complainant's attorney did prepare the Findings of Fact and Conclusions of Law, mailed a copy to defendant's attorney, which the latter still has, and submitted them to Judge Keeling, the District Court Judge, who signed them just as prepared by plaintiff's attorney without making a change of any kind whatsoever.

The changing of the connective OR to AND in quoting the term clause of the lease is to be found in Findings of Facts No. 2, Tr. of R. 177. Then once in Findings of Fact 9 and 12 (Tr. R. 180-181) and twice in the Findings of Fact No. 11 (Tr. R. 180) the findings use the phrase "to produce oil and gas in paying quantities." Throughout all the Findings of Fact and Conclusions of Law, when mentioned, production is spoken of in the aggregate. Thus clearly the District Court's decision is based on a lease provision not contained in the lease, the subject of this litigation.

Appellant, in its brief filed in the Circuit Court, pages 76 to 80, and in its reply brief, pages 29 to 32, called attention to the fact that the lease in its term clause contained the connective OR and not AND and that therefore, the gas operating expenses be-

ing inconsequential, the gas production held the lease in force under the decision of the Supreme Court of Texas in *Garcia* v. *King*, 164 S.W., 2d 509, in which that Court said "If a well pays a profit, even small, over operating expenses, it produces in paying quantities, although it may never repay its cost, and the enterprise as a whole may prove unprofitable."

Appellant, in the Circuit Court, in its Supplemental Petition for Rehearing in the Circuit Court of Appeals, page 8 in the brief and page 236 in the Transcript of Record says:

> "The Court's attention is again called to the fact that the language of the lease is 'as long as oil OR gas is produced' and is not as 'long as oil AND gas is produced.' "

This was followed by the dissenting opinion of Judge Sibley in which he said:

> " . . . . The motion for rehearing stressed the point that the lease continues so long as oil OR gas is produced, the lease having been misquoted by the trial court, and the difference having been overlooked by us. I think the point is well taken. There is no fact-finding that the six gas wells operate at a loss, and the evidence does not show it. The finding is that each of the twelve oil wells costs three times as much to operate as a gas well. It may well be that the gas wells pay, and if so the lease is not at an end. Unless the lessor, who is the plaintiff, establishes that neither oil nor gas is produced in paying quantities, he is not entitled to cancel his lease. . . ."

Respondent has the burden of proof. *Pershy* v. *First National Bank*, 117 S. W. 2d 861.

Respondent filed a motion to dismiss petitioner's petition for certiorari. In petitioner's reply to that motion, pages 7 and 8, it is said:

> "Respondent makes no attempt to explain its misquoting of the term clause in the lease."
>
> "Was this just an oversight and if so, why has it happened several times?"

Undoubtedly the Honorable W. A. Keeling, now deceased, must not have been informed of the misquoting of the term clause of the lease, as has just been shown, or he never would have signed these Findings with misquotation.

If Knox Miller did not know at the time he handed the Findings of Fact and Conclusions of Law to Judge Keeling that the term clause was misquoted, then when he did discover the error, either by himself or when it was pointed out to him by appellant's briefs, it became his duty to have called Judge Keeling's attention to the mistake immediately and if the Judge was at that time deceased, it became Miller's duty to have called the Circuit Court's attention to the error, either in his brief or otherwise, and it was also his duty to this Court to have made mention of the misquotation in his reply to respondent's petition for certiorari. But as to this, plaintiff's attorney has never attempted to make an explanation to anyone. Does not that present to this Court

a supervisory question of court decorum and changing of court records basic to the maintaining of the utmost confidence between courts and attorneys and to truth and justice, one that transcends every other issue in this case?

If plaintiff's attorney knowingly wrote and submitted to Judge Keeling the Findings of Fact and Conclusions of Law with the word OR changed to AND in the term clause of the lease, that constituted a fraud perpetrated upon the Honorable Judge W. A. Keeling, the Circuit Court of Appeals, and this Court and also constituted a fraud upon petitioner.

The Changing of the Connective OR to AND Makes a Vast Difference in this Case

There is a very great difference in production cost between "as long as oil OR gas is produced" and the misquoted phrase "as long as oil AND gas is produced." Therefore, that difference brings about a great change in the length of time the lease extends after the end of the primary term.

When an oil well approaches depletion it does not flow of itself but must be pumped by costly machinery and must be kept in repair, the pumping requiring gasoline and the daily attendance of at least one operator. If there is no oil pipeline extending to the wells, as is the situation as to the lease and field in the case at bar, then there is the additional

cost of trucking it to the refinery. The gas in a gas well, so long as it is produced at all, lifts itself by its own expansive power from the producing structure to the surface and is picked up right on the lease by the pipeline of the company that buys the gas. Therefore, there is no transportation cost nor pumping, no machinery to be purchased and kept repaired, no labor. Yet in spite of this difference and the fact that the term clause uses the word OR and not AND, the District Court, throughout all its findings uses the connective AND and makes the test upon which it decides the case that there must be production of both oil and gas in paying quantities. The phrase "in paying quantities" is not contained in the term clause but assuming it were, the lease is continued

and still in full force and effect because it is admited that there has been continuous production of gas whose operating cost is about nil. The amount has been shown in plaintiff's reply brief in this court. Addendi IV and V, pages 51 and 52.

In the Circuit Court of Appeals, in the motion for rehearing, Judge Sibley calls attention to the oversight in assuming that the term clause uses AND instead of OR and holds that the gas production extends the lease because plaintiff offered no proof as to amount of gas produced. The majority of the Court denied the motion for rehearing without making an explanation on this point. Consequently, in the Circuit Court of Appeals the decision of the District Court on a false term clause, one not contained in the lease, is affirmed.

The result of all this is that there never has been a judicial determination, outside of Judge Sibley's dissent, of the term clause in the lease, Plaintiff's Exhibit 1, in the District Court. Thus petitioner's property has been taken without the due process of law guaranteed to it by the Fifth and the Fourteenth Amendments of the Constitution of the United States and without such judicial determination the taking of petitioner's property could not be justified. *Fayerweather* v. *Ritch*, 195 U. S. 276.

This Court's Denial of Petitioner's Petition is in Direct Conflict with Its Own Opinion in the Case of East N. Y. Savings Bank v. Hahn, et al

On November 5, 1945, this Court, in the case of *East N. Y. Savings Bank*, 90 L. Ed. 9, held that:

> "It ('this protective power of State,' described in 290 U. S. at 440) may be treated as an implied condition in *every contract* as though it were written into it."

But the Court of Appeals approved the District Court's finding, namely:

> "Since the lease contained no saving clause but fixed precisely the terms upon which its continuance depended, these constituted no defense." Tr. R. p. 196.

It is not understandable at all, after such unlimited and clearly expressed a pronouncement by this Court that so soon thereafter it now excludes an oil

and gas lease contract from its foregoing rule. Certainly a war is as much of an emergency as a financial depression.

Under the war OPA rule defendant was stopped from completing its drilling program of 15 shallow oil wells after it brought in its seventh producer.

On pages 30 and 31 of Pettioner's Brief in Respondent's Reply, is to be found a brief statement showing how the war handicapped defendant's oil production.

Why does "the implied condition" not apply to the oil and gas lease contract in this case?

The affirmance by the Court of Appeals of the District Court's Finding that the oil and gas lease contract is immune from the directives of the President and OPA presents a syllogistic dilemma with but two alternatives, that is, either the Court of Appeals has

(a) decided a Federal question directly in conflict with a decision of this Court or

(b) decided an important Federal question which has not been, but should be settled by this Court.

Changing OR to AND in the Term Clause of the Lease Contract, that is, Changing the Second Phrase from an Alternate to a Limiting One by a Court Means Rewriting the Contract, Something Unauthorized Not Only in Texas but by All Courts

The Circuit Court of Appeals, by its decision, changed OR to AND, thus usurping a power it did not possess. To sustain that action by silence means in effect rewriting the Texas law of contract just as much as saying it in so many words. Local law controls the interpretation of Texas contracts and the point raised by petitioner. Federal courts are powerless to override decisions of Texas courts and must follow Texas decisions. *Erie* v. *Thompkins*, 58 Sup. Ct. 817.

> "Accordingly the courts have often said that they cannot make a new contract for the parties nor add to, *modify*, *vary* or *change* in any particular the contract made." 10 Tex. Jur. 279, with many cases cited.

At no time have respondent, the District Court or the Circuit Court of Appeals cited a single Texas case or a case from any other jurisdiction sustaining their rewriting of the Term Clause in that lease.

The Circuit Court of Appeals therefore decided an important local question in a way in conflict with Texas court decisions. This invokes the jurisdiction of this Court.

When the Court of Appeals Says "Production" Means in "Paying Quantities" It Denies Petitioner Its Constitutional Right of Contract.

The Circuit Court said "that 'production' as used in the lease in question means "production in paying quantities." That means it is impossible for par-

ties to an oil and gas lease to write a lease in which the term may be extended by the word "production," limited to what the word means by itself. To make such a lease contract is prohibited neither by statute nor by public policy.

Thus the decision of the Court of Appeals denies to lessee, the petitioner, its constitutional right under the 5th and 14th Amendments to make a contract as it chooses so long as it is not prohibited by statute or is not against public policy.

WHEREFORE, upon the foregoing grounds and those set out in the original petition of rehearing, it is respectfully urged that the petition for rehearing be granted and that the judgment of the Circuit Court of Appeals be upon further consideration reversed.

ARTHUR H. BARTELT
Attorney for Petitioner
303 Nalle Building

FAGAN DICKSON, Counsel
Austin, Texas

Certificate of Good Faith

The attorney presenting this petition for rehearing certifies that the same is presented in good faith and not for delay.

ARTHUR H. BARTELT